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Supreme Court, U.S.
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In The

Supreme Court of the United States

CRAIG LYNN RANG,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States Fifth Circuit Court of Appeals will be permitted to continue using a pretext-plus analysis in employment discrimination cases despite this Court's having expressly overruled and repudiated such an analysis in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

PARTIES

The Petitioner is Craig Lynn Rang, an individual.

The Respondent is Schlumberger Technology Corporation, a wholly owned subsidiary of Schlumberger, Limited, a publicly traded corporation listed on the NYSE by the symbol, "SLB" and also listed on the Paris, London, Amsterdam and Swiss Stock Exchanges.

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STATUTES

29 U.S.C. 623(a)(1) 1

PRIOR OPINIONS

The Fifth Circuit opinion sought to be reviewed is unpublished. (App. p. A-1). The District Court issued no opinion.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on October 21, 2002, by the United States Circuit Court of Appeals for the Fifth Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition was mailed within ninety days of November 21, 2002, the date a motion for rehearing was denied in the court below. Rules 13.3 and 29.2.

Jurisdictional basis for the Fifth Circuit is 28 U.S.C. Section 1291, and for the District Court is 28 U.S.C. Sections 1331 and 1337.

STATUTE INVOLVED

The Age Discrimination In Employment Act, 29 U.S.C. Section 623(a)(1).

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Rang filed suit alleging age discrimination under the Age Discrimination In Employment Act, 29 U.S.C. Section 623(a)(1), and various state law claims in the United

States Court for the Northern District of California which granted Schlumberger's motion for transfer. The District Court for the Southern District of Texas directed there would be no "formal discovery" allowed, ordered Rang to provide a "Bill of Particulars", and thereafter Schlumberger took his deposition. The District Court directed Schlumberger to produce some information on five comparators identified by Rang as younger employees who received more favorable treatment at the time Schlumberger terminated Rang's employment.

The District Court granted Rang permission to depose three individuals, ordered production of certain documents by Schlumberger, and instructed Rang to respond in writing after review why they were inadequate or other information was necessary. Rang outlined why the materials produced by Schlumberger were inadequate, setting forth the materials he required if he were allowed discovery. Specifically, Rang sought production of the personnel files, or at least, the performance appraisals, of each of the 12 other employees who composed the forced-ranked group at issue in the RIF.

Schlumberger moved to file a dispositive motion which Rang opposed and sought discovery. The District Court granted Schlumberger's motion to file a dispositive motion and denied Rang's motion to conduct discovery – without Schlumberger opposing the motion.

Schlumberger filed a motion for summary judgment. Rang filed his opposition memorandum along with documents in support. Schlumberger filed objections and reply. Rang filed a response memorandum.

At the November 5, 2001 summary judgment hearing, the District Court granted Schlumberger's motion for

summary judgment "on the merits that Rang recover nothing from Schlumberger", and each of Rang's claims was dismissed. The District Court did not issue reasons and signed a final judgment that date. Rang filed a timely Notice of Appeal.

Rang provided to the District Court and the Fifth Circuit uncontroverted evidence that Schlumberger's policies and procedures were not followed in the RIF process. Rang was the oldest of the comparable employees against whom he was ranked. Rang was the only employee in the division whose office closed and Schlumberger did not transfer and continue to employ. Rang provided uncontroverted evidence that based on Schlumberger's own objective criteria – job grade/classification, and job descriptions – he held a higher job grade/classification, and was objectively more qualified than many of the younger employees retained in similar positions at the time of the RIF.

The Fifth Circuit affirmed that Rang failed to establish a *prima facie* case of age discrimination. The Fifth Circuit also found that "even if plaintiff could satisfy the ADEA's *prima facie* elements", Rang failed to establish pretext, citing *Vadie v. Mississippi State University,* 218 F.3d 365, 374 (5th Cir. 2000). Also, the Fifth Circuit affirmed the District Court's decision's concerning discovery, rejecting Rang's argument that by denying production of the personnel files, or at least the performance appraisals, of all of the employees in the forced ranked group, the District Court abused its discretion during discovery. November 21, 2002, the Fifth Circuit denied Rang's motion for a rehearing.

STATEMENT OF FACTS

Rang, a degreed Electrical Engineer, thrived for twenty-five years at Schlumberger – from 1974 to 1999 – in a competitive performance-based employment system. Schlumberger awarded Rang many merit increases for his job performance, including merit raises awarded in 1997 and 1998. Also in 1997 and 1998, Schlumberger recognized Rang's job performance with special "Wildcatter Awards".

Schlumberger's "Wireline And Testing Division", which employed Rang, provides "downhole services" to the oil and gas industry. Rang quickly passed through the field ranks – Field Engineer ("FE"), Senior Field Engineer ("SFE"), and General field Engineer ("GFE"). By 1978 Schlumberger promoted Rang "out of the field" to become a Sales Engineer in the Rocky Mountains.

Rang provided the following uncontroverted facts. During the next seven years, Schlumberger assigned Rang at various times to serve as a Sales Engineer, Senior Sales Engineer, and as the District Manager of three different district offices. In 1985, Schlumberger transferred Rang within its "Wireline and Testing Division" from its Rocky Mountain Division to its West Coast Division, specifically, Bakersfield, California, as a Senior Sales Engineer. The Rocky Mountain Division ("Sub-Geomarket"), the West Coast Division ("Sub-Geomarket"), and the Alaska Division ("Sub-Geomarket") all form part of Schlumberger's U.S. Land – West and Alaska Division or "Geomarket".

Rang excelled while working in the West Coast Division. By January 1991, Schlumberger appraised his job performance an "A", noting that it was "excellent", "outstanding", and his sales revenue was "probably the best in all of NAM [Schlumberger's North American Operation]".

While in Bakersfield, Rang displayed outstanding "creativity and initiative" with Schlumberger's clients. Rang landed the first "exclusive" contract with an oil major, a practice which then was copied throughout Schlumberger's NAM operation. Due to Rang's efforts in analyzing the shallow well market in California and involvement in designing a competitive service, that market became Schlumberger's largest perforating district in North America.

In July 1991, Schlumberger assigned Rang to its Billings, Montana sales office and promoted Rang to its highest sales engineer position, Sales Development Engineer, Grade 14.

Schlumberger's Billings office consisted of one sales engineer, Rang, servicing an area known as the "Williston Basin". Rang's territory encompassed: Montana, North Dakota, and the northern halves of South Dakota and Utah. The "Williston Basin" and the Billings area have always been a difficult market for Schlumberger. The clients consist primarily of small independent oil companies rather than the major oil companies. During the next seven years (1992-1998), Schlumberger evaluated Rang's job performance as "normal", "C", "satisfactory". Schlumberger's grading system is designed to fit a bell shaped curve for all employees. A recently retired senior level manager testified a "C" means normal and satisfactory performance.

During the years Schlumberger assigned Rang to its Billings office, it awarded him "merit raises" which commended his job performance. Schlumberger's U.S. Land – West and Alaska Division or "Geomarket" Manager stated

Schlumberger awards "merit raises" only to those employees whose job performance is rated "satisfactory" or better. As recently as 1997 and 1998, Schlumberger through its Rocky Mountain Division Manager, Kellermann, awarded Rang "merit raises". During 1997, Schlumberger also awarded Rang "Wildcatter Awards", which his manager noted was "excellent". A "Wildcatter" is given in special recognition of interpretation skills and innovative introduction and uses of Schlumberger's technology for a given client's needs.

Schlumberger's Rocky Mountain Sales Manager reports to the Rocky Mountain Division Manager. Schlumberger had three different Rocky Mountain Sales Managers during the years Rang worked in the Billings sales office. Two of the three managers, Wayne Richards (1991-95), and Cordes (1995-98), recommended Rang for "merit raises" and rated his job performance a "C". Subsequent to the 1998 "merit raise", Schlumberger assigned Peters, age 39, as its Rocky Mountain Sales Manager.

Schlumberger follows a "management by objectives" philosophy. A senior level retired manager testified yearly objectives are set for an employee which are, "Mutually agreeable, measurable, attainable, and challenging". "[R]arely is anyone expected to meet all the objectives". September 21, 1998, Peters e-mailed Rang his performance objectives for the year 1998. Ten months of the year had elapsed before Schlumberger provided Rang with his objectives.

Generally, Schlumberger provides specific objectives a year in advance of the next job performance appraisal. A recently retired senior level manager testified that Rang's

"objectives were inappropriately delivered both as to method and date".

January 12, 1999, Peters rated Rang's job performance as "D", "improvement needed". Subsequently, in January-February, Peters force-ranked 13 employees he termed the Rocky Mountain "Wireline salespeople team". Peters testified that he based the forced ranking solely on the January 1999 "Performance Appraisal and Development Plan[s]". Peters did not consider any evaluations performed in previous years by previous managers. Based on Peters' forced ranking, Schlumberger selected Rang for "RIF" and terminated his employment effective September 1, 1999.

Schlumberger policies and procedures were not followed in conducting the forced-ranking. Peters included four noncomparable employees in the forced-ranked group. Of the eight comparable employees, Rang, age 49, was the oldest.

Most of the sales engineers worked at offices scattered throughout the Rocky Mountain Division (Sub-Geomarket). In addition to closing the Billings office where Rang worked, two other offices closed where sales engineers included in Peters' forced-ranking worked. Schlumberger closed the offices where Sieben and Richards worked. Schlumberger transferred these engineers, Sieben, age 36, and Richards, age 39, to other locations when the offices where they had worked closed.

Schlumberger promoted Emick to fill the open position of Sales Engineer. This was a job grade increase from 8 to 12 with a corresponding 40% increase in salary. After the RIF, he called on clients previously serviced by Rang. The appraisal used to rank Emick was for some year other

than the 1998 job performance at issue in the RIF. Schlumberger promoted Folkedahl, to fill the open position of Sales Engineer. This was a job grade increase from 7 to 12 with a corresponding 55% increase in salary. Schlumberger permitted Folkedahl to appraise his own job performance. He rated his performance a "B".

Schlumberger informed Rang April 6, 1999 that his employment would be terminated immediately. As a condition of his employment, Schlumberger had required Rang to sign an "Employment Agreement" and a "Patent and Confidentiality Agreement" which provided for six months notice prior to termination or six months pay in lieu of notice. Schlumberger's "Management Manual" provides that usually the employee will be given notice and permitted to work out the notice period. Rang attempted to enforce these agreements. In response, Schlumberger allowed him to continue working until September 1, 1999. By September there had been a dramatic upswing in the price of oil and Schlumberger was refilling its sales ranks.

During the January-February 1999 RIF, Schlumberger terminated the employment of three wireline sales engineers working in its U.S. Land – West and Alaska Geomarket ("Division"). They were: Scott Riley, age 36, grade 12; Kirk Schmidt, age 30, grade 12; and Rang, age 49, grade 14. On September 1, 1999, the date Rang's employment terminated, Schlumberger offered to rehire Scott Riley because they needed additional sales engineers. Scott Riley had a year of experience as a sales engineer. Unlike Rang, Scott Riley received his performance objectives at the beginning of 1998. Having had a year to meet them, he achieved a job performance rating of "C".

After the 1999 RIF, Poole, an Account Manager in the Rocky Mountain Sales Division, inquired of Schmidt about his willingness to return to work for Schlumberger (Schlumberger disputes this particular fact.).

Two months after Rang's employment terminated, Schlumberger hired a new field engineer to work in the Rocky Mountain Division in December 1999. Throughout the time of the 1999 RIF, Schlumberger continued to recruit engineers at Universities in the Rocky Mountain geographic area.

From the time Schlumberger informed Rang of its RIF decision, he asked to be assigned to any other job for which he was qualified – including returning to the field – and was willing to take a salary and job grade reduction. This request was ignored. Peters informed him this was only possible for employees with better career opportunities who were highly promotable. There is no job bidding system in place at Schlumberger. Transfers/promotions are left solely to management's discretion.

Mr. Gary Riley, Schlumberger's West Coast Sales Manager, a high level manager – one of the three Division Sales Managers in Schlumberger's U.S. Land – West and Alaska Geomarket until his voluntary retirement in mid-1998 – was an employee of Schlumberger for 37½ years, who bears Schlumberger no ill will. Gary Riley testified that "there is a culture of age discrimination within Schlumberger". The Rocky Mountain Division ("Geomarket") Manager at the time Schlumberger selected Rang for RIF testified that Gary Riley is a "trustworthy fellow".

After Rang's employment termination, a Schlumberger competitor agreed to hire him if he obtained a waiver

of the noncompete agreement he had with Schlumberger. Because of Schlumberger's refusal, no formal job offer was made.

REASON FOR GRANTING WRIT

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) held that a "*prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 2109. This **evidence** permits the factfinder to infer the ultimate fact of intentional discrimination. *Ibid. Reeves* states:

> "When all the legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration".

Id. at 2109.

In utter disregard of *Reeves*, the Fifth Circuit directs that an employment discrimination plaintiff does not raise a genuine issue of material fact for trial if he 1) establishes a *prima facie* case; and 2) shows that each and every reason offered by the defendant for its adverse employment decision is false. According to the Fifth Circuit, such evidence has "no probative value" with respect to the ultimate question of "whether the defendant intentionally discriminated against the plaintiff." *Vadie v. Mississippi State University*, 218 F.3d 365, 372 (5th Cir. 2002).

Vadie, at 372, states, assuming the jury believed plaintiff had superior qualifications to the members of the preferred Anglo-Saxon class, and that the reason offered by the defendant was pretextual:

> All that it proves, however, is that [defendant's] decision-makers had some unidentifiable reason for not wanting to hire Dr. Vadie. The evidence has no probative value with respect to the ultimate question before the jury of whether there was discrimination based on national origin and an essential element for Dr. Vadie to prove. There is simply not a scintilla of evidence that Dr. Vadie's national origin played any role in any decision that the defendant made with respect to him during his tenure.

This language which the Fifth Circuit now uses as its measure for whether a jury question is presented in an employment discrimination case is a direct contradiction of *Reeves*. This heightened standard, which requires some additional evidence of discrimination beyond disproving each reason offered by a defendant for its adverse employment action, is the standard the Fifth Circuit continues to use despite this Court's having previously repudiated such an elevated standard in *Reeves*.

The Fifth Circuit's ignoring of relevant facts and its use of the *Vadie* analysis, which directly contradicts *Reeves*, warrant a reversal of the Fifth Circuit's decision affirming the grant of summary judgment in Schlumberger's favor on Rang's ADEA claim.

1. Rang Established A *Prima Facie* Case

In RIF cases, to establish a *prima facie* case of age discrimination the plaintiff must 1) satisfy the standing requirements of the ADEA by showing he is within the protected group and has been adversely affected by the employer's decision; 2) show he was qualified to assume another position at the time of the discharge; and 3) produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 642 (5th Cir. 1985).

In a RIF context, a plaintiff can establish a *prima facie* case "through any type of circumstantial evidence that younger employees were more favorably treated than older employees." *Id.* at 643. The critical focus is whether younger employees working in *similar* positions are retained. *Amburgey v. Cohart Refractories Corp., Inc.*, 936 F.2d 805, 807-08 (5th Cir. 1991).

A. Standing Requirements

Rang was 49 years of age when Schlumberger terminated his employment during the January-February 1999 RIF.

B. Qualified

Rang's manager, Peters, testified Rang was qualified for the position he held at Schlumberger, Sales Development

Engineer, grade 14, when Schlumberger terminated his employment. Schlumberger did not contest that Rang was qualified for his [grade 14] position.[1]

C. Younger Employees In Similar Positions Were Retained

The group of employees ranked against one another were the "Wireline salespeople team."

Comparable Employees Included In the RIF Group:

Age/Name	Grade/Title	Location
(49) Rang	14/Sales Dev Eng.	Billings
(44) Poole	14/Sales Dev Eng.	Denver
(39) Koepsell	14/Sales Dev Eng.	Desc/Amoco
(39) Richards	14/Sales Dev Eng.	Desc/Amoco
(38) Corbett	13/Sr. Sales Eng.	Englewood
(28) Gunter	12/Sales Eng.	Desc/Tex
(30) Schmidt	12/Sales Eng.	Denver
(42) Miller	12/Sales Eng.	Desc/Amoco
(36) Sieben	12/Sales Eng.	Cody

Of the 8 comparable employees, Poole, Koepsell, Richards, Corbett, Miller, Sieben, Gunter, **all of whom are younger** than Rang, **held similar positions**, i.e.,

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[1] In addition to the position Rang held, Sales Development Engineer, **grade 14**, when Schlumberger terminated his employment, Rang was also objectively qualified for other positions at the time of his discharge. Rang was qualified for other positions which he had previously held: JFE (6/24/74-12/1/74); FE (12/1/74-1/1/76); SFE (1/1/76-4/1/78); GFE (4/1/78-12/1/78); Sales Eng. (12/1/78-10/16/79); Dist. Manager (10/16/79-10/16/80); Sr. Sales Eng. (10/16/80-1/1/82); Dist. Manager (1/1/82-1/16/82); Dist. Manager (1/16/82-5/15/85); Sr. Sales Eng. (5/15/85-7/1/91).

sales engineering positions, at the time of the RIF, **and were retained or transferred**.

According to Schlumberger's objective job grade/classification system, Rang's job grade/classification – Sales Development Engineer, grade 14 – objectively qualified him for other sales engineering positions at Schlumberger at the time of the RIF.

Like Rang, most of the sales engineers were assigned to various offices scattered throughout the Rocky Mountain SubGeomarket. The Billings office, where Rang worked, was not the only office Schlumberger closed during its RIF. Two other offices closed where sales engineers included in Peters' forced-ranking worked.

Schlumberger closed the offices where Sieben, grade 12, Sales Engineer, age 36, and Richards, grade 14, Sales Development Engineer, age 39, worked. However, unlike Rang, grade 14, Sales Development Engineer, age 49, Schlumberger transferred the younger engineers, Sieben, and Richards, to other Schlumberger locations when the offices where they had worked closed.[2] Rang, a Sales Development Engineer, grade 14, was qualified to assume other positions at Schlumberger. Rang also requested a transfer, but unlike the two younger sales engineers, Rang's request was denied.

From the time Schlumberger informed Rang of its RIF decision, he asked to be assigned to any other job for which

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[2] Richards' job grade was 14. Richards' higher job grade did not preclude his transferring to a position previously held by an individual with a lower job grade.

he was qualified – including returning to the field – and was willing to take a salary and job grade reduction. This request was ignored. Peters informed him this was only possible for employees with better career opportunities who were highly promotable. There is no job bidding system in place at Schlumberger. Peters testified transfers/promotions are left solely to management's discretion. There are no safeguards designed to avert discriminatory practices. Such systems warrant careful scrutiny. *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

Rang was the only employee on the Rockies Sub-Geomarket Wireline sales team whose office closed and Schlumberger did not transfer and continue to employ.

Thornbrough mandates, in a RIF context, the critical focus is whether younger employees working in *similar* positions are retained. *Amburgey v. Cohart Refractories Corp., Inc.*, 936 F.2d 805, 807-08 (5th Cir. 1991) mandates a similar focus.

Rang shows that of all the comparable employees who were working in similar positions, i.e., sales engineers (Grades 12, 13, or 14 – termed, Sales Engineers, Senior Sales Engineers, and Sales Development Engineers), Rang was the oldest employee, and all of those employees Schlumberger retained in similarly situated positions were younger than Rang. The Fifth Circuit ignored these facts.

From Rang's evidence a factfinder might reasonably conclude: 1) Schlumberger intended to discriminate against Rang when it terminated his employment and retained or relocated younger engineers in similar positions; and 2) Schlumberger did not treat age as a neutral factor in its decision as to whether to retain or relocate Rang. This is all *Thornbrough* and *Amburgey require.*

Under *Thornbrough v. Columbus and Greenville R. Co.*, *supra*, *Amburgey, supra,* Rang has established a *prima facie* case of age discrimination.

The Fifth Circuit ignored these facts. However, these facts demonstrate Rang established a *prima facie* case of age discrimination and created a presumption of discrimination.

2. Rang Established *Pretext*

In the context of a summary judgment proceeding, the question is whether the plaintiff raises a genuine issue of fact regarding pretext. *Thornbrough*, *supra*, at 646. "A plaintiff can prove pretext in two ways, either (1) directly by persuading the court that a discriminatory reason more likely motivated the employer or (2) indirectly by showing that the employer's proffered explanation is unworthy of credence." *Amburgey, supra,* at p. 813.

Schlumberger states it terminated Rang's employment during the RIF because of his poor job performance. Rang showed this explanation was pretext for illegal age discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence."

Rang showed **each** reason Schlumberger offered to show his job performance was unsatisfactory and caused Schlumberger to select his employment to be terminated is unworthy of credence. Under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), *Thornbrough v. Columbus and Greenville R. Co.*, *supra*, and *Amburgey*, *supra*, Rang established pretext.

A. Rang's Performance From 1991-98 Was Satisfactory Or Better

In 1991 before his transfer to Billings, Rang received a "Performance Appraisal and Development Plan" rating of "A" and was cited as "outstanding," the Sales Engineer with "probably the best [revenue] in all of NAM", Schlumberger's North American Operation.

According to Schlumberger, Rang's "Performance Appraisal and Development Plan[s]" for the years following 1992 and up through 1998 provide alleged evidence of alleged poor performance, specifically, "a need to expand the scope of the services he sold and to become up to date on new technology." No citation follows this statement. This is merely argument of counsel. No Schlumberger manager ever made such a statement.

Rang had three managers while in Billings: Wayne Richards, Mo Cordes, and Dwight Peters. Throughout 1991-1998, both Richards and Cordes recommended Rang for merit raises. Schlumberger appraised Rang's job performance "as a normal progression of a Sales Development Engineer performing at the expected level." Merit raises mean Schlumberger was satisfied with Rang's job performance.

Throughout 1991-1999, Rang was up to date on Schlumberger's new technology, and successfully sold Schlumberger "Key Services" and "new technology" while assigned to the Billings area "Williston Basin". Rang's "Performance Appraisal and Development Plan[s]" dated 1/15/90, 1/10/91, 12/1/91, 1/7/93, 1/19/95, 1/3/97, 1/9/98, document his successful performance at Schlumberger. Nothing in Rang's personnel file and specifically the "Performance Appraisal and Development Plan[s]" suggests

that for several years prior to the termination of his employment Rang was in any manner technologically deficient or unable to sell Schlumberger's "new technology."

From 1991-1998, no manager ever made any statement that Rang was in any manner technologically deficient or unable to sell Schlumberger's "new technology". No one at Schlumberger, in Rang's chain of command, ever made any statement that Rang was technologically deficient or unable to sell Schlumberger's "new technology" or "Key Services".

ELA	Rev Date	Rating	Comments
47.9%	1-7-93	C	"Average year for Montana"
–	1-12-94	–	(Document not produced)
63.35%	1-19-95	C	"total revenue at plan"
62%	1-3-97	C	"Good Work"
72%	1-9-98	C	"Excellent Year"

As the evidence shows, Rang had satisfactory or good performance from 1991-1998. Schlumberger's argument that Rang had poor performance from 1992-1998 is unworthy of credence.

B. Schlumberger's Assertion That Rang's 1999 Poor Work Performance Was The Reason He Was RIFed Is Unworthy Of Credence

According to Peters, Rang's job performance was poor, and for this reason he rated Rang's job performance a "D" in 1999 because of his "total lack of initiative to do anything about it or to get out and see customers." Peters states that when he accompanied Rang on visits to clients in the Billings area during 1998 "some acted surprised to see anyone from Schlumberger", some "would hint . . . that

they were not used to seeing Rang", saying " . . . Craig, haven't seen you in a while. We were planning on doing some work. I was wondering when somebody would call on me. . . . Statements like that."

Rang testified:

> When I took Mr. Peters out on sales calls in the Billings area, no client ever said to him or me "Craig, haven't seen you in a while. . . . We were planning on doing some work. I was wondering when somebody would call on me". . . . I was present at all times with Mr. Peters. According to Mr. Peters the statements were directed to me, therefore I would have had to be present when the purported statements were made. No such statements ever were made.

Peters statement is simply not credible. Such a serious offence by Rang, whose solo responsibility was to call on clients and sell Schlumberger services, would not have been permitted to continue for a full year. Such an offense would have been a serious performance issue which, at a minimum, would have been documented and subjected Rang to disciplinary procedures, which are highly developed at Schlumberger. As the U.S. Land – West and Alaska Division Manager, Richards, testified, Schlumberger would not hesitate to terminate employment if a serious offense occurred.

Furthermore, if in fact Peters really believed Rang was not calling on clients, he surely would have noted this serious offense on Rang's 1999 performance appraisal. However, Peters made no mention whatsoever of this

serious offence on Rang's 1999 performance appraisal or cn any other document.[3]

Regarding Rang's "supposed lack of initiative" and failure to call on Schlumberger's clients, Thomas M. Hauptman, President of KGH Operating Company, testifies:

> Mr. Rang made a point of stopping by our office on a very routine basis to determine if our company had any upcoming projects which might have required the services of Schlumberger.

John E. Grauman, Jr., Petroleum Geologist, testifies:

> Up until his departure, most logging jobs were awarded to Schlumberger not on the basis of cost, as Schlumberger was usually the highest bidder, but instead of the personal attention provided by Mr. Rang. I did not have to call Schlumberger to get a bid, because Mr. Rang would invariably find out that a well had been permitted and he called me first. . . . I would certainly contest the assertions made by Mr. Peters as to Mr. Rang's initiative. I seldom went a month without a call from Mr. Rang.[4]

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[3] "When an employer's stated motivation for an adverse employment decision involves the employee's performance, but there is no supporting documentation, a jury can reasonably infer pretext." (*Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1195 (citing *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1992)).

[4] Additional affidavits testifying to Mr. Rang's initiative and technical expertise were cited to the District Court and the Fifth Circuit [Reinschmidt, Van Delinder, Campen, Croft, Chaky, and Gimza].

In fact, as the testimonies above and Rang's sales statistics "ELA" show, Rang demonstrated extraordinary initiative. From this evidence, a reasonable factfinder could decide that Peters' statement that Rang was not calling on clients is unworthy of credence.

Peters' statement is belied by the fact that Peters, himself, had to approve Rang's monthly expense reports. These reports document the miles Rang drove to see clients and show Rang drove 35% more in 1998 (1999 Performance Appraisal and Development Plan) than in 1997. Rang's expense reports show:

ELA	Date	Grade	Miles	Merit Raise
62%	1-3-97	C	39375	Yes
72%	1-9-98	C	32857	Yes
83%	1-12-99	D	44451	No/Fired

This phenomenal effort produced results: Rang's ELA[5] increased by 11%.[6] Rang increased his ELA through additional driving on treacherous snow and ice covered secondary roads.[7] Peters personally approved and authorized reimbursement to Rang for each of these 44,451 miles. Peters acknowledged he received a monthly letter from Rang summarizing his sales activity, including clients seen

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[5] This ELA reflects that Rang sold Schlumberger services on 83 out of 100 wells drilled in his area.

[6] Rang's ELA ("estimated logging activity") increased by 11%, from 72% to 83% (January 12, 1999 "Performance Appraisal and Development Plan") the year he was terminated.

[7] A listing of clients in the area provided by Schlumberger indicates that no major oil companies were operating in this area. Thus, Rang garnered this high ELA through many sales to small operators. Rang reported this activity in his monthly letters and expense reports.

each month. From this evidence, a reasonable factfinder could decide: 1) Peters' statement that Rang showed a "total lack of initiative to do anything about it or to get out and see customers" is unworthy of credence; 2) Peters, himself, did not believe Rang was not calling on clients, and Rang was not selected to be RIFed because of poor work performance; and 3) based on the falsity of the explanation that Schlumberger is lying to mask its true discriminatory purpose.

Schlumberger maintains Rang failed to establish pretext with respect to each of the reasons offered by Peters for Rang's "D" rating. Peters had no explanation for claiming Rang had poor job performance other than "total lack of initiative to do anything about it or to get out and see customers". Peters testified that the lack of initiative encompassed "lack of activity" and "to blame others . . . and not . . . do something about it." Peters testified the way he reflected this on Rang's evaluation was by noting Rang needed development in "creativity" and "initiative" as well as "short term planning".

As to Peters' claim he could see a *lack of activity* from Rang's expense reports, the reports objectively show the miles Rang traveled seeing clients increased from 32,857 miles in 1997 to 44,451 miles in 1998. Peters testified he reviewed and approved these expense reports which supported his "perception" or "assessment" that Rang was not calling on clients. However, Rang's expense reports provide objective evidence that Peters' testimony is unworthy of credence.

The evidence shows Peters' explanation of the "D" job performance rating and his assertion Rang was RIFed because of poor work performance is not credible. None of

the objective factors on which he claims he based the rating, or "assessment" – client comments, whether Rang increased his market share in 1998, and Rang's expense reports/monthly letters – support his explanation.

Though Peters only gave the two reasons fully discussed above, if Schlumberger maintains "creativity" and "initiative" as well as "short term planning" deficiencies show Rang's job performance was poor and for this reason Schlumberger selected his employment to be terminated, Rang has addressed "initiative" above.

As to "creativity", Rang's receipt of "Wildcatters" addressed this fact. Noted on the "Performance Appraisal and Development Plan", dated January 9, 1998, are the two "Wildcatter application[s]". The manager wrote "Excellent work". Receipt of a "Wildcatter Award" at Schlumberger is indicative of creativity, initiative, expertise and proficiency in understanding Schlumberger's technology. Rang also testified he had been selected to receive a "Wildcatter Award" for his work in 1998.

Regarding short term planning, in one year Rang increased his ELA – market share-by 11%; increased calling on clients as shown by his expense reports and mileage tally – 11594 miles – from the previous year; conducted nine seminars *without being directed to do so*; and earned a "Wildcatter Award". By these measures, any assertion he did not plan his year well is unworthy of credence.

If "blamed others for his problems" is somehow claimed as indicative of poor work performance, Rang, for the only time during his twenty-five appraisals at Schlumberger, wrote a comment on his 1999 Performance Appraisal about a serious field performance issue, where no

corrective action had occurred. He testified about this issue also – the Completions Specialist assigned to perform work on jobs Rang sold had serious field performance problems that resulted in lost sales. For Rang's notifying operations about the problem, Peters reprimanded him on his 1999 Performance Appraisal. Gimza also testified about Rang doing the "Completions Specialist" job at the wellsite to correct a major problem that had occurred at the wellsite when that employee threatened to walk off the job.

Rang shows each reason Peters offered: for rating Rang's job performance "D", for substantiating Rang's "D" job performance rating, and for selecting Rang to be RIFed because of alleged poor work performance, is unworthy of credence.

C. Other Pretext Evidence: Objective Criteria Show Rang Was Clearly Better Qualified

Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 42 (5th Cir. 1996) and *Amburgey*, *supra* at p. 614, provide pretext may be established by showing a plaintiff is "'clearly better qualified' than younger employees who were retained." Specific reasons concerning the relative qualifications will establish a fact question. *Id.*

Gary Riley examined objective criteria – the job grade/classifications and comparative work performance of younger employees whom Schlumberger retained at the time of the RIF. He testified Rang was "much better qualified" than certain younger employees who were retained. Schlumberger did not refute Gary Riley's testimony. Rang was objectively "clearly better qualified" than Corbett (age 38, grade 13, Sr. Sales Eng.), Gunter (age 28,

grade 12, Sales Eng.), Miller (age 42, grade 12, Sales Eng.), and Sieben (age 36, grade 12, Sales Eng.).

CONCLUSION

The Fifth Circuit's ignoring of relevant facts and its use of the *Vadie* analysis, which directly contradicts *Reeves*, warrant a reversal of the Fifth Circuit's decision affirming the grant of summary judgment in Schlumberger's favor on Rang's ADEA claim.

This Honorable Court should grant this Petition and review the decision below. Employment discrimination plaintiffs within the Fifth Circuit must be governed by the standard set out by this Court in *Reeves*, *supra,* rather than the Fifth Circuit in *Vadie, supra*.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

CRAIG LYNN RANG,

Petitioner,

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21201
Summary Calendar

CRAIG RANG,

Plaintiff-Appellant,

versus

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas USDC No. H-00-CV-4388

(Filed Oct. 21, 2002)

Before BARKSDALE, DeMOSS, and BENAVINDES, Circuit Judges.

PER CURIAM:*

In this appeal, plaintiff argues that there are disputed material facts in existence regarding the following issues: (i) whether plaintiff has satisfied the *prima facie* elements of his ADEA case; (ii) whether defendant's proffered legitimate nondiscriminatory reason for terminating plaintiff was mere pretext for illegal age discrimination; (iii) whether defendant engaged in illegal retaliation; (iv)

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

whether plaintiff was wrongfully discharged under Montana law, (v) whether defendant's covenant not to compete to which plaintiff agreed is valid; and (vi) whether the district court abused its discretion during discovery.

The district court appropriately concluded that plaintiff is unable to satisfy the *prima facie* requirements of his ADEA claim. To establish his *prima facie* case, plaintiff must prove: (1) that he was discharged; (2) that he was qualified for his position; (3) that he was within the protected class; and (4) that he was (a) replaced by someone outside the protected class, or (b) replaced by someone substantially younger, or otherwise discharged because of his age. *See Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 992 (5th Cir. 1996); *Reeves v. Sanderson Plumbing,* 530 U.S. 133 (2000). Plaintiff's argument is limited to his assertion that defendant's employment evaluations were incorrect, rather than identifying facts supporting his claim that he was discharged because of his age or replaced by someone younger. Plaintiff's assertions cannot adequately support his ADEA *prima facie* case.

Even if plaintiff could satisfy the ADEA's *prima facie* elements, his ADEA claim would not prevail because he cannot show that defendant's legitimate nondiscriminatory reason – i.e., reduction in force – was mere pretext for illegal discrimination. Plaintiff essentially disputes defendant's assessment of his work performance, which under established precedent is insufficient to support an inference of pretext. *See Shackelford v. Deloitte & Touche, L.L.P.,* 190 F.3d 398, 408 (5th Cir. 1999); *see also Vadie v. Mississippi State Univ.,* 218 F.3d 365, 374 (5th Cir. 2000) (holding that a plaintiff can avoid summary judgment in an age discrimination case only if the evidence: (1) creates a factual issue as to whether each of the employer's stated

reasons was what actually motivated the employer; and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complaints). Furthermore, defendant's rehiring of another individual with higher performance ratings is insufficient to prove pretext. *See id.; see also Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 301 (5th Cir. 2000).

Plaintiff's claim for retaliation also fails, as the relevant ultimate employment action – plaintiff's being terminated – occurred prior to any protected activity. Furthermore, the record is devoid of any evidence of causation or retaliatory animus with respect to a claim of retaliation. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1991).

Plaintiff's wrongful discharge claim also was properly dismissed because that cause of action, by its terms, does not apply to a discharge "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those . . . that prohibit unlawful discrimination based on . . . age." Mont. Code § 39-2-912; *see also Tonack v. Montana Bank of Billings*, 854 P.2d 326, 331 (Mont. 1993). Plaintiff's sole theory of recovery for his termination is based on an allegation of age discrimination. As the ADEA covers such charges of discrimination, the Montana wrongful termination statute, by its terms, cannot. *See id.*

It is also clear that the covenant not to compete in issue here is acceptable under Montana law. Under Montana law, covenants not to compete are enforceable when they (i) are signed at or near the onset of employment;

(ii) are limited in time or geographic scope; (iii) are based upon good consideration; and (iv) afford reasonable protection without imposing any unreasonable burdens. *See Daniels v. Thomas, Dean & Hoskins, P.C.*, 804 P.2d 359, 370 (Mont. 1990); *Dobbins, DeGuire & Tucker, P.C. v. Rutherford*, 708 P.2d 577 (Mont. 1985).

Additionally, nothing indicates that the district court abused its discretion during discovery. Thus, the district court's decisions should be affirmed, as they are neither arbitrary nor clearly unreasonable. *See Moore v. Willis Indep. School Dist.*, 233 F.3d 871, 876 (5th Cir. 2000); *Kelly v. Syria Shell Petroleum Development*, 213 F.3d 841, 855 (5th Cir. 2000).

Finally, plaintiff also asserts a number of other claims, such as (i) that evidence was improperly excluded, (ii) that defendant failed to provide required documents, and (iii) that the district court made improper determinations of credibility. None of these arguments bears any merit.

Accordingly, the district court's holding is AFFIRMED.

UNITED STATES DISTRICT COURT	SOUTHERN DISTRICT OF TEXAS

CRAIG RANG,	§	CIVIL CASE H-00-4388
Plaintiff,	§	
versus	§	
SCHLUMBERGER TECHNOLOGY CORP.,	§	
Defendants.	§	

Final Judgment

Craig Rang takes nothing from Schlumberger Technology Corp.

Signed November 5, 2001, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21201

CRAIG RANG

Plaintiff - Appellant

v.

SCHLUMBERGER TECHNOLOGY CORPORATION

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

(Filed Nov. 21, 2002)

Before BARKSDALE, DeMoss and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge